

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MONTGOMERY CARL AKERS,

Plaintiff,

vs.

JAMES KESZEI, *et al.*,

Defendants.

Case No. 2:07-cv-00572-JCM-GWF

ORDER

Presently before the court is plaintiff Montgomery Carl Ackers' request (doc. #262) for this court to review Magistrate Judge George Foley's order (doc. #260) granting defendant Nicholas Voulgaris' motion for reconsideration (doc. #257) of Magistrate Judge Foley's order and report and recommendation (doc. #255), which granted plaintiff's motion for sanctions against defendant (doc. #239).

In plaintiff's motion for sanctions, he asks the court to sanction defendant because plaintiff has repeatedly requested certain documents and defendant has refused to produce these documents on grounds that he does not have them. (Doc. #239). Judge Foley reviewed plaintiff's motion, found that plaintiff had not demonstrated that defendant's response was inadequate, and denied the motion. (Doc. #250). Plaintiff filed a motion to reconsider, and attached evidence showing that defendant had previously testified at trial that he did have the documents. (Doc. #253). Judge Foley, considering defendant's trial testimony, found that defendant had not provided an adequate reason for his failure to produce the document, and granted sanctions against defendant, striking defendant's answer and entering default against defendant. (Doc. #255).

Defendant filed a motion to reconsider, alerting the court to his notarized affidavit that explained he could not produce the documents because he had discarded them after the FBI had informed him that he no longer needed to keep them. (Doc. #257). Judge Foley, taking into consideration that both the plaintiff

1 and defendant are pro se, found that defendant's explanation was satisfactory, and reversed his earlier order
2 and denied sanctions against defendant. (Doc. #260). Plaintiff asks this court to review the order vacating
3 the grant of sanctions. (Doc. #262).

4 In the present request, plaintiff argues that defendant has not shown good cause for failure to
5 produce the documents, and that this court must abide by its earlier decision to grant the motion for
6 sanctions. However, Judge Foley found the defendant's explanation shows cause for his failure to produce
7 the documents. Additionally, although Judge Foley agreed that a court generally does not reexamine an
8 issue previously decided in the same or a higher court, he noted that it may do so when to not reconsider
9 would be manifestly unjust. *See United States v. Cuddy*, 147 F.3d 1111, 1114 (9th Cir. 1998). In this
10 situation, Judge Foley determined that it would be manifestly unjust to sanction defendant for being unable
11 to produce these documents.

12 Upon review of the record, this court agrees with Judge Foley's findings. Plaintiff's assertions that
13 defendant has acted in bad faith to withhold these documents are unsupported. Furthermore, under *Cuddy*,
14 the court may reconsider an earlier order when to not do so would result in injustice. Where defendant
15 discarded the documents only upon advice that he no longer needed to store them, sanctions based on his
16 current inability to produce these documents would be manifestly unfair.

17 Accordingly,

18 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the order vacating the grant of
19 sanctions against defendant (doc. # 260) be, and the same hereby is, AFFIRMED.

20 DATED this 22nd day of November, 2010.

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24 **UNITED STATES DISTRICT JUDGE**